

The judgment in *Football League Ltd v Edge Ellison (a firm)* [2006] EWHC 1462 (Ch), [2006] All ER (D) 263 (Jun) decides no great point of law, but it is important for several reasons. The case arose from the solicitors' alleged failure to advise on bidder solvency, or the desirability of seeking parent company guarantees for the Football League Ltd's (the league's) contract with ONdigital plc for television rights, with claimed losses of £142m.

Readers will doubtless recall that ONdigital crashed spectacularly when its parent companies, Granada Media Plc (Granada) and Carlton Communications Plc (Carlton), withdrew support in a manner foreseen by few.

The decision is unlikely to be welcomed throughout the insurance industry, as professional indemnity premium rates have been low for some years and a substantial award of damages would have fuelled an increase across the board. Premiums for higher levels of cover have in recent years been priced on the assumption that there would be no claims exposure. That said, there is evidence of an increase in larger claims which has been noted in the US and the UK; likewise in continental Europe, where professional liability risk has traditionally been low for law firms. Most recently there has been a £10m award at trial in Norway.

Key issues for law firms

The judgment is the most recent in a line of authorities—previously *Pickersgill v Riley* [2004] PNLR 31, [2004] All ER (D) 407 (Feb)—establishing that in the absence of any express duty, solicitors owe no implied duty to advise commercially aware clients on the commercial aspects of transactions. The point may raise eyebrows among commercial clients who are regularly reminded by lawyers on websites and in brochures that the lawyers do in fact provide “sensible and commercial

Law firms—beware

- Guard against inadvertently assuming responsibility for commercial advice and don't overstate your abilities.
- Clearly document the scope of engagement.
- Check indemnity limits and review approach to limiting liability contractually.
- Consider limiting liability and incorporating your practice.
- Perform due diligence on taking over other law firms.
- Put someone senior in charge of risk management and training.

Costly penalty misses

Frank Maher reports on the largest law firm liability claim to go to trial in the UK and its implications for risk management

- the facts in *Football League v Edge Ellison*
- risk management lessons for law firms

advice” or “responsive, pragmatic and commercial advice”.

Football League v Edge Ellison is the largest law firm liability claim to go to trial in the UK. The successful defence, at huge cost, will be a relief to many outside the league. But the case cannot have been without cost to the solicitors, with an almost inevitable hike in premiums in the intervening years, and time spent cooperating with insurers and their solicitors.

While the focus throughout has been on Hammonds, the claim in fact related to a prior practice, Edge Ellison, putting in sharp focus the successor practice liabilities on law firms' mergers and acquisitions. Many similar tales of woe abound with firms doing inadequate due diligence on taking over other law firms resulting in substantial liabilities; and Legal Risk's *Top 100 Professional Indemnity and Risk Management Surveys* (most recently the 2006 survey) have highlighted many aspects of inadequate due diligence on lateral partner hires.

That the decision is highly fact-specific is demonstrated by the fact that Mr Justice Rimer found:

- (i) no duty to advise on guarantees on 11 May 2000; but
- (ii) there was a duty to advise on guarantees on 15 June 2000 and again in August 2000.

An adverse finding under (i) would have resulted in liability for nearly £100m, for the loss of a chance of obtaining guarantees, before deduction for contributory negligence. However, the finding of breach under (ii), which arose from a point on the documentation, caused no loss at all, resulting in two awards of nominal damages (£2 each) for the breach of contract. Those breaches should not be dismissed as trivial: it was good luck, not good management which limited their effects.

Had the league succeeded, its damages would have been reduced by 75% for contributory negligence. Although this exceptionally high assessment would not have been

a record, it is significant because a solicitor's “breach of duty will usually be in relation to a matter within his special expertise as a solicitor, being a duty which is not usually one relating to a purely commercial matter of judgment falling squarely within the client's own competence” (see *Football League v Edge Ellison*, para 330).

Football League v Edge Ellison is yet another in a long line of claims from the sporting and media sectors—high-risk areas of work where the documentation is often found to be lacking, and the clients' expectations are in inverse proportion to their attention to documentation detail. From a risk management perspective, the case is a reminder for solicitors that if they are advising on law, not commercial aspects, it is prudent to document that in the engagement, ensure they do not go beyond their retainer, and check their publicity material does not overstate their position.

“Many similar tales of woe abound with firms doing inadequate due diligence on taking over other law firms”

Defence skill set—depleted?

The defence team must take credit for the result. However, it is pertinent to reflect on whether defence teams' skills generally are being depleted. Having reached their height during the defence by the Solicitors Indemnity Fund of multiple lending claims during the 1990s, the volume of instructions to defence panel firms has diminished. The consequent lack of trial experience, fuelled also by increased mediation and encouragement to settle, means that in future there may be few brave enough to run such cases to trial when the stakes are so high.

Frank Maher is a partner at Legal Risk solicitors. Website: www.legalrisk.co.uk